SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 506

SYSTEM FEDERATION NO. 59 OF THE RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR,

Petitioner,

vs.

LOUISIANA & ARKANSAS RAILWAY COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals is reported in 119 F. (2d) 509, and that of the District Court in 30 Fed. Supp., 909, and 32 Fed. Supp., 89.

II.

Jurisdiction.

For the sake of brevity, the Statement of Jurisdiction, paragraph B, in the petition, page 5, is here incorporated by reference.

III.

Statement of the Case.

The summary statement of the matter involved, set forth in the petition, pages 1-5, is here incorporated by reference.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the National Railroad Adjustment Board, Second Division, did not have jurisdiction of the claim on which it entered an award in this case.

2. The Circuit Court of Appeals erred in holding that the award of the National Railroad Adjustment Board, Second Division, failed to contain sufficiently definite findings of fact to be enforceable.

3. The Circuit Court of Appeals erred in holding that the amended complaint failed to state a claim on which relief could be granted.

4. The Circuit Court of Appeals erred in holding that the amended complaint did not contain a claim for relief arising out of breach of the 1929 contract, prior to February 9, 1931, and of the 1931 rules after such date.

V.

ARGUMENT.

Summary of the Argument.

POINT "A".

THE RAILROAD LABOR ACT OF 1934 GAVE THE NATIONAL RAILROAD ADJUSTMENT BOARD AN UNRESTRICTED JURISDICTION OVER LABOR DISPUTES; AND THE SPECIFIC INCLUSION THEREIN OF "CASES PENDING AND UNADJUSTED ON JUNE 21, 1934" DID NOT OPERATE TO LIMIT THE BOARD'S POWER TO ACT TO SUCH CLASSIFIED DISPUTES. (*Post.* 13.)

POINT "B".

ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE BOARD'S JURISDICTION WAS LIMITED TO "CASES PENDING, ETC."; CLAIMS WHICH COULD NOT BE SUBMITTED FOR CONFERENCE BECAUSE OF RESPONDENT'S REFUSAL TO RECOGNIZE, AND TREAT WITH, THE REPRESENTATIVES OF ITS EMPLOYEES WERE "CASES" WITHIN THE CONTEMPLATION OF THE ACT. (*Post.* 16.)

POINT "C".

AN AWARD OF THE NATIONAL RAILROAD ADJUSTMENT BOARD WHICH FINDS A CERTAIN CLASS OF EMPLOYEES ENTITLED TO CERTAIN RELIEF, AND REQUIRES THE PARTIES TO THE DISPUTE TO CHECK AND DETERMINE THE NAMES OF AND AMOUNTS DUE THE INDIVIDUALS AFFECTED, IS VALID; SINCE THAT IS CERTAIN WHICH CAN BE MADE CERTAIN. (*Post.* 17.)

POINT "D".

THE COMPLAINT SOUGHT THE FIXING OF SENIORITY RIGHTS ARISING UNDER BOTH A CONTRACT OF 1929 AND POSTED RULES OF FEBRUARY 9, 1931, AND DAMAGES ARISING FROM THE BREACH OF EACH, DURING ITS OR THEIR RESPECTIVE EXISTENCE; SINCE THE PETITIONER BROUGHT SUIT ON BEHALF OF EMPLOYEES WHO WOULD HAVE BEEN GOVERNED BY EITHER OR BOTH, A CLAIM WAS CLEARLY STATED UPON WHICH RELIEF COULD AND SHOULD HAVE BEEN GRANTED. (*Post.* 18.)

Argument Under Point "A".

In creating the National Railroad Adjustment Board, Congress gave to the Second Division thereof, and we quote: "jurisdiction over disputes involving machinists, boilermakers, etc. * * *" (45 U. S. C. A., Sec. 153-h). In providing the means of invoking the exercise of this unlimited jurisdiction, it later said, and again we quote, that: "The disputes between an employee * * * and a carrier * * * including cases pending and unadjusted

on June 21st, 1934 (shall be handled a certain way, and then may be referred to the Board)" (45 U. S. C. A., Sec. 153-i).

The Circuit Court of Appeals seized upon the above phrase of inclusion as a means of holding the Board impotent to act in this case. "The claim, however," says the court, "was not a 'pending and unadjusted case' on June 21, 1934, and therefore not one of which the Board had jurisdiction (119 F. (2d) 514; R. 94)." And again: "Nowhere in the claim before the Board was it contended that any of the seniority disputes in question were ever presented to anyone or were pending as a 'case' anywhere, until after October, 1937 (119 F. (2d) 514; R. 92)."

At worst, the result of the court's logic is to render the Board powerless to act on *any* type of dispute which had not been presented as a "case" prior to June 21st, 1934. At best, it would so restrict the Board's jurisdiction of disputes arising prior to the fateful date. For example, the bitterest of labor disputes may have arisen in April, 1934, and reached such maturity as to threaten complete interruption of interstate commerce by August 15th, 1934; yet, the Adjustment Board would not have jurisdiction to settle the difficulty if no "case" had been presented to anyone prior to June 31st, 1934. On the other hand, the most trivial labor complaint that had been reduced to a "case" by formal presentation to a section foreman prior to June 21st, 1934, could be handled by the Board. Congress intended nothing so foolish.

The context of the Act, as well as the ordinary meaning to be accorded the words there used, demand the interpretation of the phrase as one of addition, or specification of a part of the greater whole, and not of exclusion or limitation. The word "include," to quote Mr. Justice Butler of this Court, "is frequently, if not generally, used as a word of extension or enlargement rather than as one of

limitation or enumeration (citing cases)." This view was announced in extending the definition of the term "creditor" to common law conceptions, despite the provisions of the Bankruptcy Act specifying what the term "shall include" (*American Surety Co.* v. *Marotta*, 287 U. S. 513, 517; 77 L. Ed. 466, 468).

When the participle of "include" is used, as here, it must follow that it modifies the earlier substantive phrase: "The disputes between an employee, etc." (*Montello Salt Co.* v. *State of Utah*, 221 U. S. 452, 464-465; 55 L. Ed. 810, 814; and also see: *Helvering* v. *Morgans, Inc.*, 293 U. S. 121, 125, 79 L. Ed. 232, 235; *Cannon* v. *Nicholas*, 80 F. (2d) 934, 936; *Cunningham* v. *Sizer Steel Corp.*, 1 F. (2d) 337, 338-9; *U. S.* v. *Nat'l. City Bank of N. Y.*, 21 Fed. Supp. 791, 795). So considered, we must conclude that the specified cases are to be contained in, or comprise a part of, the broader classification of "disputes." Most certainly they should not be said to be the *only* class of disputes the Board was empowered to adjust. The "cases" referred to were likely those in which local or system boards had theretofore become deadlocked (see Appendix A, p. 24, this brief).

The Circuit Court of Appeals has construed a provision of prescription, or limitation, into the Act which Congress definitely refused to place there. Such limitation was sought by the opponents of the Act before the House Committee on Interstate and Foreign Commerce, but refused (see Apepndix B, page 24, this brief). So late as January, 1941, the Committee on Administrative procedure, appointed by the Attorney General of the United States, failed to see limitations of any sort on the time for filing claims under the Act (see Appendix C, page 24, this brief).

We earnestly believe that the future functioning of the Adjustment Board will be greatly hampered, if the decision of the Circuit Court of Appeals should remain the

law in this case. The policy should be to enlarge, rather than restrict, the field of endeavor of the Board. It was created by remedial legislation, that must have arisen from consideration of the impotency of the then existing mediation Board to bring recalcitrants to task. This impotency should not be judicially imparted to the Adjustment Board through unjustified construction of a plain and unambiguous statute.

Argument Under Point "B".

Petitioner's statement (p. 4, petition), shows that the complaint charged the Respondent with deliberately refusing to recognize any representatives of its employees from September 15th, 1930 to October 20th, 1937, or to maintain regular channels for the settlement of labor disputes during such period (R. 20). Manifestly, the only means of seeking settlement of the controversy over seniority, under these circumstances, was by requests of the individual employees of the Respondent, which, says the complaint, were made (R. 20). But, the Circuit Court of Appeals clinches the conclusion that there was no "case" pending by saying, and we quote, "indeed there was no regular channel for presenting disputes or cases (119 F. (2d) 513; R. 92)." Indeed, indeed! Will the Respondent be rewarded for creating such chaotic conditions as that no labor "case" *could* be brought to its attention by representatives of its employees? And this, in the face of the Railway Labor Act of 1926 (45 U. S. C. A., Sec. 146-1 through 12; R. 12).

In the absence of compelling reasons therefor, the word "case" will not be restricted to its narrow or technical legal meaning (*U. S.* v. *Fid. & Cas. Co. of N. Y.*, 115 F. (2d) 475, 7; *Sloven* v. *Wheeler*, 58 Tex. 23, 25). It must not be so restricted, where to do so would punish the carrier that tried to treat fairly with its employees, by recognizing their representatives and providing some means for settling labor

disputes, and reward one that did the converse. No less a "case" of labor dispute is presented where, perforce the carrier's opposition to unions, employees must individually seek their seniority rights, than where the rights are sought by a union. To say otherwise, would, we repeat, place a premium on high handed disregard of the principles of collective bargaining.

Argument Under Point "C".

In view of the fact that the proper procedure would have required a re-reference of the claim to the Board if its award was void for uncertainty (119 F. (2d) 514; R. 93-94), we devote little argument to this point. However, the tendency of some courts to nullify the functions of administrative boards by hypertechnical procedural requirements challenges treatment. More certainty in the present award was required by the Circuit Court of Appeals, than has ever been demanded of arbitration awards at common law. For example, a common law award ordered the payment of money by the losing party, quoting, "to the executor of the said John Grier", in *Grier, et al.* v. *Grier,* 1 Dall. 173, 1 L. Ed., 87. In answer to the contention that the award was too uncertain for enforcement, and could not be aided by averment, Chief Justice McKean replied:

> "John Grier, deceased, has executors, who they are may be easily ascertained; as easily as the costs of an action, *or the charges of a voyage*, which have been adjudged to be good awards, because they can be reduced to a certainty. 3 Cro. 383, Beale *v.* Beale and 1 Rolls Abr. 251. So that this award appears to be certain enough * * *.
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> "With respect to the observation, that an award is to be interpreted by its own words, and not by any matter out of it, it is law; but when the words of an award have relation to things certain, out of the award, these things may be averred." (Italics supplied.)

Of similar import are the cases of *Lynn* v. *Risberg*, 2 Dall. 180, 1 L. Ed., 339; *Lutz* v. *Linthicum*, 11 Curtis 58, 8 Peters 165; *Standard Chem. & Oil Co.* v. *Sloan Company*, 268 F. 225, 229, and 5 *Corpus Juris*, Sec. 361, page 151, where it is said:

> "When an award furnishes a substantial basis by and through which the parties can, by calculation, by reference to a fixed standard of rule of law, *or by the inspection of particular things or documents, work out the contemplated result* in accordance with the principles settled by, and the rights of the parties declared in, the award, it will be regarded as sufficient. In such cases courts give much force to the maxim. Certum est quod certum reddi potest." (Italics ours.)

Comparison of the Interstate Commerce Act (49 U. S. C. A., Sec. 1, *et seq.*), with the Railway Labor Act (45 U. S. C. A., Sec. 153), discloses that Congress clearly patterned the powers tendered the Adjustment Board on those granted the Interstate Commerce Commission (particularly compare 49 U. S. C. A., Sec. 16 subd. 2, with 45 U. S. C. A., Sec. 153, subd. p). This Court has repeatedly held that the awards of the Interstate Commerce Commission are adequate where ultimate rather than evidential facts are stated, and this where the Commission is by statute required to make specific findings (See *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, at 427, 59 L. Ed. 533, at 656; and *Mills* v. *Lehigh Valley R. Co.*, 238 U. S. 473 at 481, 59 L. Ed. 1414 at 1418). No greater burden should have been put on the Adjustment Board by the Circuit Court of Appeals.

Argument Under Point "D".

Both the District Court, and the Circuit Court of Appeals, make a fetish of their conclusion that the 1929 contract was abrogated by the proceedings that culminated in the posting of rules on February 9, 1931. It is beyond cavil that relief

was sought by some of the men in the nature of damages for breach of this contract *before* February 7th, 1931 (see Statement, petition page 3; R. 7-10, and paragraph IV-A, R. 10; 119 F. (2d) 512; R. 89, note 8). There was a complete diversity of citizenship, and the subject matter of the case exceeded three thousand dollars ($3,000.00) in value (R. 6, *et seq.*). The period of prescription or limitation had not run under the Louisiana law on the date suit was filed (see Appendix C, page 24). Hence, viewed in its narrowest aspect, the complaint stated a claim on which relief could be granted in the way of damages for breach of contract, irrespective of the Railway Labor Act. This, not because "once an employee, always an employee, once a senior, always a senior (119 F. (2d) 514, R. 94)," but on account of the legal principle, unquestioned before the Circuit Court of Appeals' opinion herein, that a person is bound not only to perform his engagements, but also to repair all the damages that accrued naturally from their breach (*Curtis* v. *Innerarity*, 6 Howard 146, 16 Curtis 632, 634).

Basing the claim on broader grounds, the same proceedings which brought about the supposed abrogation of the 1929 contract, culminated in the substitution of the February 9th, 1931 rules as the future working agreement. These rules were, of course, as binding on the respondent as upon the employees who worked under them. Some of the employees, says the complaint, worked under these rules, and were therefore wrongfully cut off and held out of service in violation of the same (R. 8-10, 11-12; 119 F. (2d) 512; R. 89, note 8). All, further says the complaint, "accepted the seniority rights tendered by (respondent) * * * in said rules of February 9th, 1931, and became bound thereby * * * " (Second paragraph, R. 18). Again, most restrictively, a justiciable claim was stated for the men whose date of wrongful furlough showed they had worked under the February 9th, 1931 rules.

We take the more liberal position, however, that the men in the service of the Respondent, but on furlough, were entitled to the benefits and charged with the burdens of the rules; if the 1929 contract was in truth abrogated or revised by them. Efforts at collective bargaining would uniformly be futile, if one of the parties to be affected by rule or contract resulting therefrom, could obey or enforce it at will. This would seem to be kindergarten logic. Why the elaborate provisions and adjurations in the 1926 Railway Labor Act (45 U. S. C. A., Sec. 146, paras. 1-13), for conferences for the purpose of establishing rules or contracts governing working conditions, if the rules resulting from conference are to be applied solely to new employees, who were not represented at the conferences, out of which the rules came? To attain fair standards of collective bargaining, the employees must have the right of either accepting proposed rules, or of exerting economic pressure by striking in protest thereat. Apparently, the shop craft employees felt any working rules were better than a strike, in crucial 1931; and, if the 1929 contract was abrogated, accepted the February 9th, 1931 rules in lieu thereof. Most assuredly the shop craft employees could, and would, have voted a strike, had the respondent openly refused to establish *any* rules of seniority. This would have possibly caused the appointment of an emergency board by the President (45 U. S. C. A., Sec. 160), and certainly would have invoked a decision through force of economic pressure. Under the view of the Circuit Court of Appeals, the Respondent is to be justified in tendering rules purportedly governing *all* shop craft employees, and then capriciously refusing to apply them to employees on furlough on their effective date. This should not do at all.

Respondent does not contend it had *no* rules of working conditions between February 9th, 1931 and October 20th, 1937; in fact, it submitted Rule 9 as one of a group govern-

ing seniority in the February 9, 1931 rules to the Adjustment Board (R. 32, 36). The Respondent confessed that the rules governed "each of the employees above mentioned (referring to the crafts of its shops)" (R. 32). The question so becomes narrowed to the inquiry of whether the rules affected men in service, but on furlough, February 9, 1931. Does the term "employees", with whom the carrier has the duty of making agreements to avoid interruption of interstate commerce (45 U. S. C. A., para. 146, Sec. 2), embrace those temporarily off active duty through reduction in forces? If we are not to approve collective bargaining in theory, but destroy it in practice, the craft, not the individual employees, must be the bargaining unit, and as such bound by agreements. As said by Justice Simons in *National C. & St. L. Ry. Co.* v. *Rwy. Employees Dept. of A. F. of L.*, 93 F. (2d), 340, cert. den., 303 U. S. 649, 82 L. Ed., 1110:

> "Those who by agreement retain their seniority rights, which entitle them to preference in reinstatement, and by such agreement not only possess rights but are the subject also to obligations, *have not only a future but a present interest in all negotiations* which affect the hours of labor, rates of pay *and working conditions* governing the craft in which they have long been schooled and disciplined. Outside their craft they would fall generally into the ranks of the unskilled, *and as we have seen, the craft and not a more temporary group is the statutory unit for negotiation.* The very emphasis laid by the appellant upon the conflicting interests in an election between those presently working and those temporarily suspended but serves to demonstrate this present interest, and it is not without importance in this connection that the furloughed men whose votes in the election were challenged were all back at work when the case was tried below." (Italics supplied.)

It would indeed be a backward and reactionary step to say that a worker, who has been furloughed through no fault of his own, thus loses his employee relationship. There can be no justification for holding a man on strike to be an "employee" (*Jeffery-DeWitt Insulator Co.* v. *Nat. Labor Rel. Board,* and cases cited, 91 F. (2d), 134, 7, and *Nat. Lab. Rel. Brd.* v. *Carlisle Lmbr. Co.,* 94 F. (2d), 138, 146), but one on furlough to be a "previous employee", as was done by the District Court herein. (32 Fed. Supp., 90, 3rd para.) Such anomaly will remain in the Federal jurisprudence, however, until the errors of the Circuit Court of Appeals in this case be corrected.

The working agreement of October 20th, 1937 in no way limited the rights of the presently complaining employees, or purported to be retroactive in any respect. Certainly it did not do so with regard to rights existing from 1929 to the effective date of the 1937 agreement (See Exhibit "B" brought up as original exhibit, R. 72, and see R. 16).

Conclusion.

It is therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the attempted ham-stringing of the functioning of the National Railroad Adjustment Board by harrowing its jurisdiction to cases pending and unadjusted on June 21st, 1934, and by requiring it to find evidential, rather than ultimate facts, may be avoided, and such Board may in the future perform its duties unhampered by such unjustifiable restrictions; and in order that the various employees who have for years been deprived of their livelihood, through defendant's action, may recover their status as employees, and be compensated for the damages occasioned them, and that to such an end a writ of certiorari

should be granted, and this Court should review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, and finally reverse it.

Respectfully submitted,

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